

DOCKET NO.: KNL-CV17-6030617-S : SUPERIOR COURT
JOHN DRABIK AND : J.D. OF NEW LONDON
ANCIENT HIGHWAY TOWERS, LLC
V. : AT NEW LONDON
ELAINE THOMAS : APRIL 24, 2022

MEMORANDUM IN OPPOSITION TO MOTION TO DISMISS

Plaintiffs John Drabik and Ancient Highway Towers, LLC hereby object to the Defendant’s Motion to Dismiss on the grounds that the doctrine of tribal immunity is inapplicable to this matter as the Defendant is being sued in her individual capacity for acts outside the scope of her employment for conduct that occurred off the reservation and the principal of comity is not applicable to this matter because the Tribal Court matter was not determined on the merits and the Mohegan Council of Elders decision violates Connecticut public policy on the litigation privilege.

I. STANDARD OF REVIEW

“A motion to dismiss . . . properly attacks the jurisdiction of the court, essentially asserting that the plaintiff cannot as a matter of law and fact state a cause of action that should be heard by the court.” (Internal quotation marks omitted.) *Bacon Construction Co. v. Dept. of Public Works*, 294 Conn. 695, 706, 987 A.2d 348 (2010). When a . . . court decides a . . . question raised by a pretrial motion to dismiss, it must consider the allegations of the complaint in their most favorable light. . . . In this regard, a court must take the facts to be those alleged in the complaint, including those facts necessarily implied from the allegations, construing them in a manner most favorable to the pleader. . . . The motion to dismiss . . . admits all facts which are well pleaded, invokes the existing record and must be decided upon that alone.” (Internal quotation marks omitted.) *Bennett v. New Milford Hospital, Inc.*, 300 Conn. 1, 10 11, 12 A.3d 865 (2011).

II. LAW & ARGUMENT

A. Plaintiff's Request to Amend Complaint Should be Ruled on Prior to the Motion to Dismiss

Prior to the Defendant filing her Motion to Dismiss (Entry No. 125.00), the Plaintiffs filed their Request to Amend Complaint (Entry No. 123.00). The Plaintiffs respectfully submit that their Request to Amend should be ruled upon prior to the court considering the Motion to Dismiss.¹ As discussed in more detail in the Plaintiff's Reply to Objection to Request to Amend Complaint (Entry No. 127.00), the Request to Amend Complaint should be ruled on prior to deciding the Defendant's Motion to Dismiss since the Request to Amend was filed first and the amendment would resolve the issue of subject matter jurisdiction raised in the Motion to Dismiss.

B. Defendant Acted Outside the Scope of Her Employment Therefore She Is Not Entitled to Sovereign Immunity

The Defendant attempts to argue that the Defendant is protected by sovereign immunity because she was acting in her official capacity. The Defendant's assertion is meritless because the Plaintiffs have specifically alleged that the Defendant make false statements that were outside the scope of her employment and therefore she was acting in her individual capacity. In Paragraph 16 of the Complaint, the Plaintiffs allege:

"16. The Defendant knew at the time she made her statements regarding the impact on the view shed of cultural stone features or cultural landscapes contained in the Response that such statements were false because no such features or landscapes existed or exist in the area and therefore were outside the scope of her employment."

¹ The Defendant's objection to the request to amend was on the court's short calendar for March 21, 2022. The court's decision is still pending.

Moreover, Paragraph 29 of the Complaint alleges: “Elaine Thomas, acting outside the scope of her employment, has intentionally interfered with the business relationship between the Plaintiffs and AT&T while knowing of the relationship’s existence.” The Plaintiffs further allege Ms. Thomas misrepresented the existing of any view shed of cultural stone features, cultural landscapes or properties of traditional religious and cultural significance to the Mohegan Tribe. Complaint ¶ 31. It is unreasonable to claim that fabricating the existence of stone features is within the scope of Ms. Thomas’s employment duties, especially when the Plaintiffs have directly alleged that she was acting outside the scope of her duties. The false statements of Ms. Thomas are the basis for the tortious interference claim, not the allegation that the Mohegan Tribe

In *Drabik v. Thomas*, 184 Conn. App. 238, 245-46, 194 A.3d 894, 898 (2018), cert. denied, 330 Conn. 929, 194 A.3d 778 (2018), the Appellate Court explained that “[t]he doctrine [of tribal immunity] does not extend to tribal officials when acting outside their authority in violation of state law.” The *Drabik* Court further explained: “The distinction between individual- and official-capacity suits is paramount here. In an official-capacity claim, the relief sought is only nominally against the official and in fact is against the official's office and thus the sovereign itself.... Personal-capacity suits, on the other hand, seek to impose individual liability [O]fficers sued in their personal capacity come to court as individuals ... and the real party in interest is the individual, not the sovereign.

“The identity of the real party in interest dictates what immunities may be available. Defendants in an official-capacity action may assert sovereign immunity....“There is no reason to depart from these general rules in the context of tribal sovereign immunity.” (Citations omitted; emphasis in original; internal quotation marks omitted.) *Lewis v. Clark*, — U.S. —, 137 S.Ct.

1285, 1291–92, 197 L.Ed. 2d 631 (2017). *Drabik v. Thomas*, *supra*, 184 Conn. App. 238 The *Drabik* court determined that the bill of discovery was properly dismissed because the facts alleged in the bill of discovery were not claims against the defendants in their individual capacities or otherwise exceed the scope of their authority.

Here, unlike in the bill of discovery matter, the Plaintiffs’ allegations are against the Defendant in her individual capacity. Further, the Plaintiff have alleged that the Defendant was acting outside the scope of her employment. Thus, considering the allegations of the complaint in their most favorable light, the doctrine of sovereign immunity does not apply in this case because the real party in interest is the individual Defendant Elaine Thomas.

C. Judicial Estoppel Inapplicable to this Case

The Defendant cites to federal caselaw from the Eastern District of Washington and the Ninth Circuit Court of Appeals to support her claim that judicial estoppel prevents the Plaintiffs in this matter from alleging that the Defendant was acting in her individual capacity and outside her scope of employment. The Defendant’s argument fails to satisfy any of the elements of judicial estoppel under Connecticut law.

“[J]udicial estoppel “will apply if: 1) a party's later position is clearly inconsistent with its earlier position; 2) the party's former position has been adopted in some way by the court in the earlier proceeding; and 3) the party asserting the two positions would derive an unfair advantage against the party seeking estoppel.... We further limit judicial estoppel to situations [in which] the risk of inconsistent results with its impact on judicial integrity is certain.... Thus, courts generally will not apply the doctrine if the first statement or omission was the result of a good faith mistake ... or an unintentional error.” (Internal quotation marks omitted.) *Dougan v. Dougan*, 301 Conn.

361, 372–73, 21 A.3d 791 (2011). “[T]he judicial estoppel doctrine depends heavily on the specific factual context ... before the court.” *Dep’t of Transp. v. White Oak Corp.*, 319 Conn. 582, 612, 125 A.3d 988, 1005 (2015).

In the prior bill of discovery matter between the parties, the Plaintiffs’ allegations did not address directly whether the Ms. Thomas was acting outside the scope of her employment. Similarly, with regards to the Mohegan Tribal Court complaint, the Plaintiffs’ allegations did not address directly whether the Ms. Thomas was acting outside the scope of her employment. Thus, the Defendant cannot satisfy the first element of judicial estoppel.

Regarding the second element, whether the party's former position has been adopted in some way by the court in the earlier proceeding, no court has adopted the position that Ms. Thomas was acting in the scope of her duties because that position has never been asserted by the Plaintiffs. Further, the question of whether Ms. Thomas was acting in scope of employment was never determined by the Mohegan Court.

As to the third element that the party asserting the two positions would derive an unfair advantage against the party seeking estoppel, the Plaintiffs would not derive an unfair advantage. First, the Plaintiffs never specifically address the issue of Ms. Thomas exceeding the scope of her employment. Second, the Plaintiffs’ allegations in a complaint do not result in an unfair advantage. The Plaintiffs will need to prove their case and the Defendant is able to put on defenses. There is no unfair advantage in the Plaintiff alleging more specific facts in their complaint.

Additionally, the Plaintiffs prior allegations did not make clear that no cultural stones existed and that Ms. Thomas acted outside the scope of her employment by making false statements. The Plaintiffs filed the bill of discovery to learn where the supposed cultural stones

were located. Since that time the Plaintiffs have obtain information that provides a good faith basis for asserting that no such cultural stones exist. Thus, any omission regarding Ms. Thomas being outside the scope of her employment when she made false statements was an omission that was the result of the Plaintiffs not initially having all the information they required because Ms. Thomas failed to provide the requested information.

In sum, the Defendant has failed to demonstrate the doctrine of judicial estoppel applies in this matter. Similarly, the Defendant argument for applying the doctrine of comity is incorrect.

D. Comity is Inapplicable Because the Mohegan Case Was Not a Determination of The Merits and Violates Connecticut Public Policy

“(C)omity is a flexible doctrine, the application of which rests in the *discretion* of the state where enforcement of a foreign order is sought. Because comity is a flexible doctrine, its contents are peculiarly subject to the dictates of public policy and considerations of fairness to litigants.” (Emphasis added) *Walzer v. Walzer*, 173 Conn. 62, 70, 376 A.2d 414 (1977). The doctrine stems from *Hilton v. Guyot*, 159 U.S. 113 (1895). In that case, the United States Supreme Court explained that “[c]omity, in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws.” *Id.*, at 163–64. “[W]here there has been opportunity for *a full and fair trial* abroad before a court of competent jurisdiction, conducting the trial upon regular proceedings, after due citation or voluntary appearance of the defendant, and under a system of jurisprudence likely to secure an impartial administration of justice between the citizens of its own country and those of other countries, and there is nothing to show either prejudice in the

court, or in the system of laws under which it was sitting, or fraud in procuring the judgment, or any other special reason why the comity of this nation should not allow it full effect, the merits of the case should not, in an action brought in this country upon the judgment, be tried afresh, as on a new trial or an appeal, upon the mere assertion of the party that the judgment was erroneous in law or in fact.” (Emphasis added) *Id.*, at 202–203, 16 S.Ct. 139.

The Connecticut Supreme Court has similarly explained that “judgments of courts of foreign countries are recognized in the United States because of the comity due to the courts and judgments of one nation from another. *Litvaitis v. Litvaitis*, 162 Conn. 540, 544–45 (1972). “Such recognition is granted to foreign judgments with due regard to international duty and convenience, on the one hand, and to rights of citizens of the United States and others under the protection of its laws, on the other hand.” *Id.* “This principle is frequently applied in divorce cases; a decree of divorce granted in one country by a court having jurisdiction to do so will be given full force and effect in another country by comity....” *Id.* “The principle of comity, however, has several important exceptions and qualifications.” *Id.* “A decree of divorce will not be recognized by comity where it was obtained by a procedure which denies due process of law in the real sense of the term, or was obtained by fraud, or where the divorce offends the public policy of the state in which recognition is sought, or where the foreign court lacked jurisdiction.” *Id.*

The Defendant asserts without any supporting evidence that this case should be dismissed because the Mohegan Tribal Court action was determined on the merits. However, the Mohegan action was not determined on the merits. First, there was no full and fair trial. Rather, the Mohegan action was dismissed because the Mohegan Tribal Court, as affirmed by the Mohegan Appellate Court and Council of Elders, found a lack of subject matter jurisdiction. Without subject matter

jurisdiction, a court cannot determine a case on the merits. Indeed, as the Defendant started in her objection to request for leave to amend complain, “It is axiomatic that once the issue of subject matter jurisdiction is raised, it must be immediately acted upon by the court. ... Our Supreme Court has explained that once raised ... the question [of subject matter jurisdiction] must be answered before the court may decide the case.” *Fennelly v. Norton*, 103 Conn. pp. 125, 136–37, 931 A.2d 269, cert. denied, 284 Conn. 918, 931 A.2d 936 (2007). Thus, by finding there was no subject matter jurisdiction the Mohegan courts, the Mohegan courts did not decide the case on the merits and, therefore, the principal of comity does not apply in this case.

Moreover, the Plaintiffs was not permitted to conduct discovery in the Mohegan case on the counts of tortious interference with a business relationship, negligence, and negligent supervision. Indeed, the Mohegan Tribal Court actively prevented the Plaintiffs from conducting discovery when it granted the defendants’ motion to quash to prevent the Plaintiffs from taking Elaine Thomas’ deposition and obtaining a copy of Ms. Thomas’ file regarding the cultural stones. The Mohegan Tribal Court’s order stayed compliance with the Plaintiffs’ subpoena and Ms. Thomas’ deposition until further order of the court. *See* attached Order Re: Defendant's Motion to Quash and For Protective Order dated August 12, 2016.² By not being able to conduct discovery, the Plaintiffs claims were not decided on the merits because the Plaintiff could not obtain any evidence let alone present such evidence for the Mohegan court to consider. Further, not being able to conduct discovery means there was no due process for the Plaintiffs such that the Mohegan proceedings were not fundamentally fair to the Plaintiffs.

² While the Plaintiffs were eventually able to take Ms. Thomas’ deposition five years later, the Mohegan Tribal Court severely limited the scope of the deposition to the remaining trespass count.

In addition to not being permitted to conduct discovery, the Mohegan proceeding was ultimately decided by the Mohegan Council of Elders. No member of the Council of Elders was a lawyer at the time of its ruling against the Plaintiffs. Further, the Council of Elders (along with the Tribal Council) governs the entire Mohegan Tribe. Thus, the very party the Plaintiffs were suing decided the fate of the Plaintiffs' claims on a pre-trial motion to dismiss in which the Plaintiffs were not permitted to conduct discovery. "This strikes at the very first principle of any judicial system that every litigant should receive a fair and impartial hearing and that the process satisfy the parties that they have received such a hearing. However fair the proceedings in the tribal court may be in actuality, it would be difficult, if not impossible, to so satisfy the parties in these circumstances. *See Low v. Madison*, 135 Conn. 1, 9-10, 60 A.2d 774 (1948); *see also Papa v. New Haven Federation of Teachers*, 186 Conn. 725, 745-46 (1982).³" *Drumm v. Brown*, 245 Conn. 657 (Conn. 1998)(*McDonald, J., dissent*).

In addition to the lack of fairness to the Plaintiffs, the decision of the Mohegan Council of Elders violated Connecticut's public policy on the issue of the litigation privilege. Connecticut law on the litigation privilege extends the privilege to preparatory communications that are either (1) part of an intention to file a claim (*Kelley v. Bonney*, 221 Conn. 549 (1992)); or (2) required by law to take action or requested by government agency (*Hopkins v. O'Connor*, 282 Conn. 821, 830 (2007) i.e. communications have been found to be part of quasi-judicial proceedings when required by administrative regulations.

³ In this respect, the Second Circuit has stated: "No nation is under unremitting obligation to enforce foreign interests which are fundamentally prejudicial to those of the domestic forum. Thus, from the earliest times, authorities have recognized that the obligation of comity expires when the strong public policies of the forum are vitiated by the foreign act." (Internal quotation marks omitted.) *Pravin Banker Associates, Ltd. v. Banco Popular del Peru*, 109 F.3d 850, 854 (2d Cir.1997).

In addition to the limitations on preparatory communications stated above, the Restatement (Second) of Torts, which Connecticut courts have adopted regarding the litigation privilege, explains that “communications before the commencement of litigation are immune ‘only when the communication has some relation to a proceeding that is contemplated in good faith and under serious consideration. The bare possibility that the proceeding might be instituted is not to be used as a cloak to provide immunity.’” 3 Restatement (Second), Torts § 587, p. 250, comment (e) (1977).” *Schreiber v. Federal Insurance Co.*, Superior Court, judicial district of Middletown, Docket No. CV-00-0091899 (January 9, 2001, Arena, J.)(denying motion to strike litigation privilege for communications made to plaintiff’s attorney concerning the plaintiff’s drunk driving causing an accident).⁴

In contrast to Connecticut law that requires a communication be intended to be part of a quasi-judicial proceeding that is being contemplated in good faith and under serious consideration, the Mohegan Council of Elders simply asserted that Mohegan law on the issue of litigation privilege applies to any and all “[r]esponses prepared by the Mohegan Tribal Historic Preservation

⁴ The Supreme Court has recognized the validity of comment e of Restatement (Second) of Torts § 588. *See Gallo v. Barile*, 284 Conn. 459, n. 13 (2007). The Superior Court has frequently relied on Comment e. *See e.g.* and *Carney v. Amendola*, Superior Court, judicial district of Ansonia-Milford, Docket No. CV106003738 (May 15, 2014, *Brazzel-Massaro, J.*). Connecticut appellate courts have frequently cited and relied upon parallel provisions of the Restatement in discussing absolute privilege. *See, e.g. Hopkins v. O’Connor*, 282 Conn. 821, 830 (2007) and *McKinney v. Chapman*, 103 Conn. App. 446, (2007) quoting and relying on Restatement (Second), Torts § 587 (1977) and *McManus v. Sweeney*, 78 Conn.App. 327, 332 (2003)(relying upon §586 in discussing the absolute immunity of attorneys for defamatory statements made in judicial proceedings). Finally, the good faith and under serious consideration requirement has been adopted by states across the country ranging from California and Massachusetts to Texas. *See Edwards v. Centex Real Estate Corp.*, 61 Cal.Rptr.2d 518 (1997), *James v. Brown*, 637 S.W.2d 914 (Tex.1982); *Sriberg v. Raymond*, 345 N.E.2d 882 (Mass. 1967). Like the Restatement, the Connecticut Supreme Court has relied on California law when analyzing the litigation privileged. *See e.g. Kelley v. Bonney, supra*, 221 Conn. 571. The requirement of good faith and serious consideration guards against lies like the oath and fear of a charge of perjury does when a witness is actually testifying during a proceeding. In *DeLaurentis v. New Haven*, 220 Conn. 225, 264 (1991), the Connecticut Supreme Court explained that “the oath and the fear of being charged with perjury are adequate to warrant an absolute privilege for a witness’ statements. Parties or their counsel who behave outrageously are subject to punishment for contempt of the court. Parties and their counsel who abuse the process by bringing unfounded actions for personal motives are subject to civil liability for vexatious suit or abuse of process.”

Office in the context of the Section 106 review process pursuant to the National Historic Preservation Act fall within the scope of the litigation privilege and as such, receive absolute immunity.” Further, according to the Council of Elders: “The Federal Communication Commission's TCNS is part of the federal government's fulfillment of its obligations under the National Historic Preservation Act, and as such, when a response to a notice is filed by the Mohegan Tribe, the response is prepared in anticipation of quasi-judicial proceedings. Such quasijudicial proceedings include, but are not limited to, Connecticut Siting Council proceedings or other activities pursuant to Section 106.”

This ruling from Council of Elders violates Connecticut law and public policy because it makes a general assertion that a response from its Tribe filed in the TCNS is automatically prepared in anticipation of a quasi-judicial proceeding. The Mohegan decision does not require consideration of the intent, which is in stark contrast to Connecticut law. Moreover, the conclusion of the Mohegan Council of Elders is incorrect as a matter of law and fact.

First, the TCNS is separate from the Section 106 process. TCNS is governed by 47 C.F.R. Part 1, App. C and these regulations do not provide for any kind of adjudication. Unlike TCNS, Section 106 has its own regulations, 36 CFR Part 800, that requires a federal agency like the FCC to be actively involved and even hold hearings that could possibly be considered quasi-judicial.

Second, use of the TCNS system does not start the Section 106 Consultation process. Rather, the process under Section 106 is a Consultancy process of the NHPA, and it starts when a FCC Form 620 or Form 621 is filed with the FCC or when a Tribe requests a formal government-to-government Section 106 Consultancy with the FCC. *See* 36 CFR Part 800. Of note, the Defendant Elaine Thomas could have started the Section 106 process by requesting a formal

government-to-government Section 106 Consultancy with the FCC in her Response or other correspondence with the FCC. *See* 47 C.F.R. Part 1, App. C. But she chose not to do so likely because as the Plaintiffs allege there are no cultural stones in existence.

Third, a response sent through the TCNS system has no relation to the Connecticut Siting Council (CSC). The CSC is only concerned with state law and regulations. The Connecticut Siting Council has no involvement with the FCC, Section 106 or TCNS. *See* CT Regs. Secs. 16-50j-1 to 16-50j-55 and 16-50j-70 to 16-50j-90. Thus, any communication through the FCC's TCNS is not part of the CSC proceeding. In other words, use of TCNS is not in anticipation of a proceeding with the CSC because the two are mutually exclusive.

In sum, Mohegan Council of Elders established a policy that no matter the intention of a person filing a response with the TCNS and no matter the content of the response, that response is automatically considered to have been made in anticipation of a quasi-judicial proceeding. Such a policy is inconsistent with the law and facts regarding the TCNS system. More importantly, the Mohegan determination violates Connecticut law and public policy on the issue of the litigation privilege by completely ignoring the issue of intent. Since the Mohegan action was not considered on the merits, was not fair to the Plaintiffs and the Council of Elders ruling violates Connecticut law this court should not apply the principal of comity to this lawsuit.

E. Mohegan Tribal Court Does Not Have Jurisdiction of Over Claims Between Non-Tribal Members Concerning Actions Occurring Outside the Mohegan Reservation.

Here, the Complaint alleges that the Defendant is a resident of Connecticut and that her actions were outside the scope of her employment. *See* Complaint ¶¶ 3, 16, 17 and 29. Thus, the allegations against Elaine Thomas in this matter are against her as an individual, non-tribal

member.⁵ Moreover, many of the allegations concern the existence of historically and culturally significant features on property located miles from the Mohegan Reservation. Additionally, the trespass claim is for actions that occurred off the Mohegan reservation on the private property of the Plaintiff John Drabik, a non-tribal member, resident of the State of Connecticut.

The Mohegan Tribal Court does not have jurisdiction to consider the claims brought here in Superior Court because the Mohegan Tribal Court's jurisdiction is limited to "torts arising from actions of the Mohegan Tribe of Indians Connecticut . . . and their respective authorized officials, agents, employees and representatives acting *within* the scope of their authority or employment on behalf of such entities, wherever located." (Emphasis added) Mohegan Tribal Code, Article IV, Section 3-244.

The Mohegan Tribal Court is a court of limited jurisdiction. Its jurisdiction is articulated in Section 1-17 of the Mohegan Tribal Code, entitled General Subject Matter Jurisdiction. This section provides:

Subject to any contrary provisions, exceptions, or limitations contained in either an applicable federal law, the Mohegan Constitution, or as specified in Section 1-18 of this Article, the Mohegan Tribal Court shall have jurisdiction over all civil causes of action for which the Tribal Council enacts enabling legislation or grants the Court jurisdiction by contract with the express waiver of sovereign immunity contained in this Article, and over all offenses prohibited by Mohegan Tribal law. The Mohegan Tribal Court shall not immediately assume jurisdiction over those criminal offenses listed within the Major Crimes Act, 18 U.S.C. § 1153, such offenses being within the purview of the federal authorities. However, should the federal authorities find there is not sufficient cause to have the matter prosecuted under the Major Crimes Act, U.S.C. § 1153, then Mohegan Tribal authorities may proceed and file a cause of action with the Mohegan Tribal Court.

⁵In *Drumm*, the Plaintiffs were Connecticut State Police Officers who were not tribal members. The Defendants were police officers for the Mashantucket Pequot Tribe or the Tribe's gaming enterprise. The Defendants were sued in their official capacity as employees and/or members of the tribe. See *Drumm*, fn. 2.

See Mohegan Tribal Code, Chapter 1, Division 2, Article I, Section 1-17 attached as Exhibit A.⁶

The only enabling legislation that could possibly relate to the causes of action alleged in this matter is the Mohegan Torts Code. The Mohegan Tribal Council enacted Article IV of the Mohegan Tribal Code to establish the Mohegan Torts Code. Section 3-244 states the purpose of the Mohegan Torts Code:

The Mohegan Tribe of Indians of Connecticut, a federally-recognized sovereign Indian tribal nation occupying the Mohegan Reservation on land held in trust by the United States in Uncasville, Connecticut, intends this Code to govern the adjudication of torts arising from actions of the Mohegan Tribe of Indians Connecticut and from actions of the Mohegan Tribal Gaming Authority, and their subordinate entities and their respective authorized officials, agents, employees and representatives acting *within* the scope of their authority or employment on behalf of such entities, wherever located.

See Mohegan Tribal Code, Chapter 3, Article IV, Section 3-244 attached as Exhibit B.⁷

The Mohegan Torts Code establishes that the Mohegan Tribal Court will only adjudicate torts arising from actions of employees acting within the scope of their employment. Here, the allegations are that Elaine Thomas acted outside the scope of her employment when she misrepresented the existence of historically and culturally significant features over one-half mile from the Plaintiff's property. Thus, the Mohegan Tribe Court lacks jurisdiction to hear this matter, so that the exhaustion requirement "would serve no purpose other than delay." *Nevada v. Hicks*, *supra*, 533 U.S. 369.

⁶ The Mohegan Tribal Code, Chapter 1, Division 2, Article I is available at https://library.municode.com/tribes_and_tribal_nations/mohegan_tribe/codes/code_of_laws?nodeId=PTIIMOTRINCO_CH1GO_ARTIMOCOSY_DIV2MOTRCO

⁷ The Mohegan Tribal Code, Chapter 3, Article IV is available at https://library.municode.com/tribes_and_tribal_nations/mohegan_tribe/codes/code_of_laws?nodeId=PTIIMOTRINCO_CH3JU_ARTIVTOCO

It would be imprudent for this court to defer its jurisdiction in favor of another court when the other court has no subject matter jurisdiction to resolve the trespass claim. Since the tribal court lacks jurisdiction over an alleged trespass in East Lyme, the Defendant's Motion to Dismiss should be denied.

III. CONCLUSION

Wherefore, for the forgoing reasons, the Plaintiffs respectfully request that the Defendant's Motion to Dismiss be denied.

THE PLAINTIFFS,

By: /s/ Eric J. Garofano

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CERTIFICATION

I certify that a copy of the above was mailed and/or delivered electronically on this 24th day of April 2022 to all counsel and self-represented parties of record, as indicated below.

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/s/ Eric J. Garofano
Eric J. Garofano
Commissioner of the Superior Court

Exhibit A

DOCKET NO. CV-16-0105

JOHN DRABIK, ET AL.

MOHEGAN TRIBAL COURT

vs.

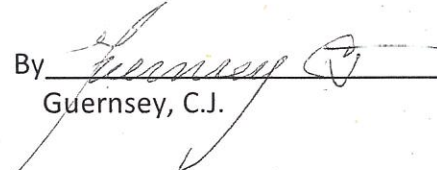
THE MOHEGAN TRIBE OF
INDIANS OF CONNECTICUT, ET AL.

AUGUST 12, 2016

**ORDER RE: DEFENDANT'S MOTION TO QUASH AND FOR PROTECTIVE ORDER;
PLAINTIFF'S OBJECTION TO MOTION TO QUASH AND FOR PROTECTIVE ORDER
(Pleadings Nos. 108, 109)**

In view of the numerous and complex legal issues presented, and the lack of urgency stipulated to by counsel for all parties, Defendant's Motion to Quash Subpoena and for Protective Order is GRANTED, and Plaintiff's Objection thereto is OVERRULED, but only to the extent that compliance with Plaintiff's subpoena and the taking of the deposition of the Defendant Elaine Thomas, referenced therein, is stayed pending further order of this Court.

Mohegan Tribal Court

By 
Guernsey, C.J.

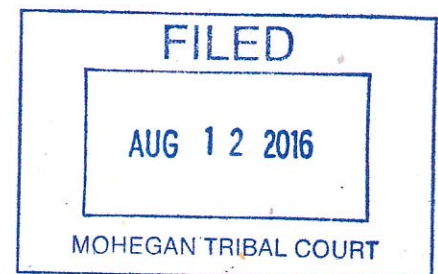
Notice Mailed on: August 12, 2016

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08-12-16 A11:31 IN